Supreme Court, U. S.
FILED
NOV 21 1975
MICHAEL RODAK, JR., CLERK

No. 74-1487

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

COLIN F. MACCOLLOM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
RICHARD L. THORNBURGH,
Assistant Attorney General,
FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
JEROME M. FEIT,
MICHAEL W. FARRELL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional provision and statutes involved	2
Statement	3
Summary of argument	7
Argument	12
An indigent prisoner who did not appeal his conviction is entitled to a verbatim transcript of his trial only if he can demonstrate that a transcript is necessary to support a nonfrivolous attack on his conviction or sentence	12
A. The Constitution is satisfied when an indigent defendant is afforded a fair opportunity to have his claims adjudicated	13
B. An indigent defendant has a fair opportunity to have his claims resolved by taking an appeal	20
C. The fundamental differences between appeal and collateral attack support the requirements of Section 753(f)	24
D. The routine provision of trial transcripts without a showing of need would significantly increase the workload of court reporters and contribute to the already serious problem of delay in the federal appellate courts	33
Conclusion	37

597-434—75——1

CITATIONS

Cases:

	Page
Aubut v. *Maine*, 431 F. 2d 688	32
Beasley v. *United States*, 491 F. 2d 687	27
Benthiem v. *United States*, 403 F. 2d 1009	13, 33
Bentley v. *United States*, 431 F. 2d 250, certiorari denied, 401 U.S. 920	13
Bernier v. *Moore*, 441 F. 2d 395	32
Bonner v. *Henderson*, 517 F. 2d 135	13
Britt v. *North Carolina*, 404 U.S. 226	17, 22
Bruce v. *United States*, 379 F. 2d 113	27
Burns v. *Ohio*, 360 U.S. 252	15, 16
Chavez v. *Sigler*, 438 F. 2d 890	13
Coppedge v. *United States*, 369 U.S. 438	11, 14, 18, 20, 31, 37
Culbert v. *United States*, 325 F. 2d 920	13
Davis v. *United States*, 417 U.S. 333	25, 26
Douglas v. *California*, 372 U.S. 353	18–19
Draper v. *Washington*, 372 U.S. 487	14, 15, 16
Ellis v. *Maine*, 448 F. 2d 1325	13
Eskridge v. *Washington*, 357 U.S. 214	16
Gardner v. *California*, 393 U.S.. 367	22, 25
Garner v. *Louisiana*, 368 U.S. 157	28
Gibbs v. *United States*, 346 F. Supp. 1237	13
Griffin v. *Illinois*, 351 U.S. 12	8, 14, 15, 16
Hardy v. *United States*, 375 U.S. 277	18, 20
Hensley v. *Municipal Court*, 411 U.S. 345	6
Hill v. *United States*, 368 U.S. 427	26, 33
Hines v. *Baker*, 422 F. 2d 1002	13
Jones v. *Cunningham*, 371 U.S. 236	6
Jones v. *Superintendent*, 460 F. 2d 150, certiorai denied, 410 U.S. 944	13, 35
Kaufman v. *United States*, 394 U.S. 217	26, 28
Ketcherside v. *United States*, 317 F. 2d 807	33

Cases—Continued

	Page
Lane v. *Brown*, 372 U.S. 477	6, 8, 14, 15, 25
Long v. *District Court of Iowa*, 385 U.S. 192	15, 25
Martinez v. *United States*, 344 F. 2d 325	13
Mayer v. *City of Chicago*, 404 U.S. 189	15, 17, 18
Poe v. *United States*, 299 F. Supp. 6	13
Roberts v. *LaVallee*, 389 U.S. 40	17
Ross v. *Moffitt*, 417 U.S. 600	8, 9, 15, 16, 18, 19, 20, 23, 25
Schilling v. *Rogers*, 363 U.S. 666	4
Schneckloth v. *Bustamonte*, 412 U.S. 218	4, 34
Skelly Oil Co. v. *Phillips Co.*, 339 U.S. 667	4
Smith v. *Bennett*, 365 U.S. 708	15, 25
Sunal v. *Large*, 332 U.S. 174	10, 25
Townsend v. *Sain*, 372 U.S. 293	26
United States v. *DeCoster*, 487 F. 2d 1197	27
United States v. *Hammonds*, 425 F. 2d 597	27
United States v. *Herrera*, 474 F. 2d 1049, certiorari denied, 414 U.S. 861	13
United States v. *Radford*, 452 F. 2d 332	27
United States v. *Rubin*, 433 F. 2d 442	27
United States v. *Schmitz*, C.A. 9, No. 75–2056, decided August 5, 1975	21
United States v. *Shoaf*, 341 F. 2d 832	13, 24, 29
United States ex rel. Vajtauer v. *Commissioner of Immigration*, 273 U.S. 103	28
Wade v. *Wilson*, 396 U.S. 282	12
Williams v. *Oklahoma City*, 395 U.S. 458	15

Constitution and statutes:

	Page
United States Constitution:	
Fifth Amendment	2, 20
Sixth Amendment	27
Criminal Justice Act, 18 U.S.C. 3006A	20
18 U.S.C. 472	3
28 U.S.C. 753(b)	5

Constitution and statutes—Continued Page
28 U.S.C. 753(f) ---------- 2, 10, 11, 13, 20, 22-23, 24, 30, 33, 34, 36, 37
28 U.S.C. 1391(e) ---------- 4
28 U.S.C. 1915(a) ---------- 2, 13, 31
28 U.S.C. 1915(b) ---------- 5
28 U.S.C. 2201 ---------- 4
28 U.S.C. 2250 ---------- 3, 21
28 U.S.C. 2255 ---------- 4, 10, 25, 28, 33
Miscellaneous:
Annual Report of the Director of the Administrative Office of the United States Courts:
1972 ---------- 35
1973 ---------- 35
1974 ---------- 35
1975 ---------- 34, 35
Ebersole, *Improving Court Reporting Services,* Federal Judicial Center (February 1972) ---------- 35
Oaks and Lehman, *A Criminal Justice System and the Indigent* (1969) ---------- 30
Proposed Rules Governing § 2255 Proceedings for the United States District Courts, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Preliminary Draft, 1973 ---------- 28–29
Sokol, *The Availability of Transcripts for Federal Prisoners,* 2 Am. Crim. L. Q. 63 (1964) ---------- 33
Wright, *Federal Practice and Procedure: Criminal* § 595 (1969) ---------- 26

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1487

UNITED STATES OF AMERICA, PETITIONER

v.

COLIN F. MACCOLLOM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–22a) and the dissent from the denial of rehearing *en banc* (Pet. App. 23a–28a) are reported at 511 F. 2d 1116. The order of the district court (Pet. App. 30a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29a) was entered on August 2, 1974. The government's timely petition for rehearing and suggestion of rehearing *en banc* was denied on February 26, 1975 (Pet. App. 23a–24a). The petition for a writ of certiorari was filed on May 27, 1975, and was granted on

in Forma Pauperis" (App. 6–7). At the direction of the Chief Judge, the clerk of the court returned the "Motion" to respondent and informed him that, until respondent filed a motion pursuant to 28 U.S.C. 2255, the district court had no power to act upon his request for a transcript (App. 10).

On June 23, 1972, respondent, still appearing *pro se*, filed a document entitled "Complaint for Declaratory Judgment and Injunctive Relief" (App. 11–13).[1] He alleged that he "intends to move this Court for vacation of his sentence pursuant to 28 U.S.C. § 2255," that because of his poverty he was unable to purchase a transcript of his trial, and that he believed that the transcript would show that he had not been afforded effective assistance of counsel and that there was insufficient evidence to support the verdict of guilty. The complaint also alleged that without a transcript respondent would be "unable to frame his arguments for fair and effective review" (App. 12); it contended that his inability to obtain a transcript therefore de-

[1] The complaint alleged jurisdiction under 28 U.S.C. 2201 (the declaratory judgment statute) and 28 U.S.C. 1391(e). Neither statute is a grant of jurisdiction; Section 1391(e) is a venue provision, and the declaratory judgment statute simply establishes a remedy available in cases for which there is an independent source of federal jurisdiction. See, *e.g.*, *Schilling* v. *Rogers*, 363 U.S. 666, 677; *Skelly Oil Co.* v. *Phillips Co.*, 339 U.S. 667, 671.

Neither the district court nor the court of appeals discussed the problem of jurisdiction over respondent's complaint. We believe, however, that there is jurisdiction pursuant to 28 U.S.C. 2255; respondent has alleged that he is entitled to release from custody, and the request for a transcript may properly be viewed as ancillary to an underlying (albeit as yet unfiled) Section 2255 action.

prived him of due process of law.[2] The complaint did not state why respondent believed counsel had been inadequate or the evidence insufficient, nor did respondent advance any reason—other than his bare assertion—to believe that the transcript would provide support for his contentions.

After respondent had filed his complaint, the district court granted him leave to proceed *in forma pauperis*. Counsel was appointed and represented him at a hearing in the district court on January 12, 1973 (App. 3–4). After that hearing, the district court entered an order dismissing the complaint for failure to state a claim upon which relief could be granted (Pet. App. 30a). Respondent appealed. During oral argument in the court of appeals, respondent's counsel "candidly argued that he cannot represent to the court that specific constitutional grounds for relief exist until after he has seen a transcript" (Pet. App. 2a).

A divided panel of the court of appeals reversed, holding that "an indigent federal prisoner, permitted to proceed *in forma pauperis*, * * * is entitled to * * * a [verbatim] transcript, upon request in order to assist him in the preparation of a postconviction

[2] Respondent also alleged that 28 U.S.C. 753(b) and 1915(b) entitled him to a transcript. However, Section 753(b) simply establishes the manner in which notes and recordings of courtroom proceedings are to be made, and Section 1915(b) excuses an individual who has been permitted to proceed *in forma pauperis* from paying for reproduction of the record on appeal. Neither section authorizes the provision of trial transcripts without cost, and the court of appeals did not rely upon them.

597-434—75——2

motion under 28 U.S.C. § 2255" (Pet. App. 19a; footnote omitted). The court rejected the government's argument that an indigent prisoner[3] should be required to make a colorable claim that the transcript would be necessary to establish facts that would make out an arguably meritorious contention of entitlement to collateral relief. It concluded, instead, that because the Constitution requires the government to provide transcripts on direct appeal, it creates an identical entitlement for purposes of collateral attack.[4]

With five judges registering their dissents, the court of appeals rejected the government's suggestion for an *en banc* rehearing. Judge Wallace, writing for the dissenters, pointed out that although "justice should not be determined by the size of a pocketbook, an indigent is not entitled to any more than an average defendant who is able to pay his own way" (Pet. App. 24a). Because such an average defendant, who had not taken an appeal, would be unlikely to expend his resources on a transcript unless he believed that it

[3] Respondent was incarcerated at the time of the court's decision. He has since been paroled. This case is not moot, however, because an individual on parole is still "in custody" for purposes of collateral relief. *Jones* v. *Cunningham*, 371 U.S. 236; cf. *Hensley* v. *Municipal Court*, 411 U.S. 345.

[4] The court limited its holding to cases in which a federal *prisoner* seeks a transcript, reserving the question whether a convicted person who seeks a transcript only after his release from prison is equally entitled to a transcript (Pet. App. 19a, n. 9). But respondent himself is not a "prisoner." Moreover, so long as the convicted person is on parole, he is "in custody" (see n. 3, *supra*), and we see no valid basis for denying him the same preparatory aid for collateral attack that the court deemed constitutionally necessary in the case of prisoners. Cf. *Lane* v. *Brown*, 372 U.S. 477.

would reveal facts necessary and likely to establish his claim for relief, Judge Wallace argued that the government is under no obligation to provide a free transcript to an indigent prisoner unless that prisoner can make a comparable showing.

SUMMARY OF ARGUMENT

With the single exception of the court of appeals in this case, every federal court that has considered the question has held that a prisoner, seeking a transcript of his trial in order to peruse that transcript for errors upon which to base a collateral attack, must either pay for the transcript he seeks or demonstrate that the transcript is necessary to support an arguably meritorious claim for relief. The court of appeals thought this rule inconsistent with recent cases of this Court.

The premise of the court of appeals is that, once an avenue of judicial review has been created, that review must be available to the destitute and to the "wealthy" upon an absolutely equal basis. Because the "wealthy" are allowed to purchase trial transcripts without demonstrating a "need" for them or potential merit to their claims, the court reasoned that the indigent prisoner must be given a trial transcript without charge. We think that the court of appeals' analysis fails because this Court has not established a rule of absolute equality, but has instead required only that the indigent be afforded a fair opportunity for effective review. Respondent has been afforded such an opportunity. He could have appealed and

received a trial transcript, which later would have been available for use on collateral attack. Failing that, he could have attempted to demonstrate a need for the transcript he seeks.

A. In a series of cases involving indigents who asserted that they were unable to purchase transcripts, this Court has made it clear that once a government creates a right to judicial review, it cannot erect barriers that preclude its effective exercise by indigents. The rationale of these cases is that the government must afford indigents the same "practical opportunity for review" that is available to those who can pay for transcripts. *Griffin* v. *Illinois,* 351 U.S. 12, 23 (Frankfurter, J., concurring). The difficult task faced in each case is giving meaning to the abstract requirement that indigents must have "adequate and effective" means of review. *Lane* v. *Brown,* 372 U.S. 477, 483. In some types of cases this may mean that transcripts should be provided as of course, but in others an indigent can obtain effective and fair review by using informal substitutes for a transcript, and in others no transcript at all will be needed, either because the claim can be resolved without a transcript or because there is no colorable claim.

Ross v. Moffitt, 417 U.S. 600, summarized many of the considerations that had informed *Griffin* and the other transcript cases. The Court held that absolute equality between indigents and those who can afford to pay is not required by the Constitution. The fact that a particular service might conceivably "be of

benefit to an indigent defendant does not mean that the service is constitutionally required" (417 U.S. at 616). What is required in some forms of proceedings may not be required in others. What was necessary on direct appeal was held to be not constitutionally required in subsequent proceedings. Here, where respondent bypassed his right to appeal, analogous limitations apply.

B. Respondent has had the "adequate opportunity to present his claims fairly" (*Ross, supra,* 417 U.S. at 616) that the Constitution requires. He could have appealed his conviction, and he has not alleged that he did not know of this opportunity. Had he done so, he would have been entitled to a trial transcript of sufficient completeness to enable him to present any claim of error he chose. If his appeal had been unsuccessful, he would have been entitled to receive a copy of the already-prepared transcript for use in seeking collateral relief. Respondent's current "difficulties" stem not from his poverty but from his own decision not to appeal his conviction.

It is true that indigent defendants are differently situated from non-indigents if they bypass their opportunity to appeal. But there are good reasons for introducing incentives to take appeals; an appeal leads to speedy resolution of claims of error and, if there is error, to a retrial before evidence has dissipated and memories faded.

Moreover, the very fact that a defendant who chose not to appeal later contends that his trial was infected with error suggests that something has hap-

pened in the interim to make him change his mind about the merits of his case. It suggests, in other words, that the defendant has recalled or become aware of something that he thinks might entitle him to relief. We see no constitutional flaw in requiring him to relate this as a precondition to receiving a transcript—in many instances the court would be able to order a partial transcript prepared or rule that the allegations, even if true, do not establish an entitlement to relief.

C. This argument is reinforced by the different standards of review that govern claims made on appeal and those made collaterally. It is an established rule that the writ of *habeas corpus* and its federal counterpart, 28 U.S.C. 2255, "will not be allowed to do service for an appeal" (*Sunal* v. *Large,* 332 U.S. 174, 178). Most of the errors that might occur at trial (and therefore would be reflected in a trial transcript) must be presented on appeal or not at all. By contrast, the grounds for collateral attack—if supported by any documents—usually are revealed in documents other than the trial transcript. We submit that Congress was entitled to conclude that a prisoner who bypasses his appeal should be required to demonstrate some need for a trial transcript and some probability that the transcript would support a claim cognizable on collateral review. Congress has done no more than require the prisoner to demonstrate that he falls within the exception rather than the rule.

Indeed, it seems fair to say that the requirements Congress has imposed in 28 U.S.C. 753(f) are necessary to achieve rough equality between the indigent

and a prisoner of average means who could, with some sacrifice, pay for a trial transcript. The prisoner of average means, acquainted with the extraordinarily narrow scope of collateral review, would inquire of himself whether he needed a transcript to support a colorable claim; a prisoner of average mears would be willing to pay for a trial transcript (and forego what his money otherwise could buy) only if he believed the transcript would be useful to him. Section 735(f) directs to the indigent prisoner the same questions that a prisoner of average means would direct to himself before spending money for a trial transcript. We submit that this process is not so fundamentally unfair to the indigent prisoner that it denies him due process of law. If he can satisfy the requirements of Section 753(f), a transcript will be furnished without charge. If he cannot satisfy the standards of that section, it is most unlikely that he could establish an entitlement to collateral relief even with the aid of a transcript.

D. The major function served by Section 753(f) is to permit the district courts to sift frivolous cases from those deserving a greater call upon the limited resources of the courts and court reporters. The process created by Section 753(f) substantially duplicates the process by which district courts approve appeals *in forma pauperis*—a process that has been interpreted and upheld in *Coppedge* v. *United States,* 369 U.S. 438. In the absence of such a screening device, requests for transcripts to be used only for perusal in the hope of finding an error would require many

hours of court reporters' time—time that otherwise could be devoted to speedier transcription of materials necessary for appeals and for arguably meritorious collateral attacks. We do not argue that the drain upon judicial and reportorial resources is a good reason for denying trial transcripts altogether; that would be too high a price to pay. But the practical requirements involved in the provision of trial transcripts many years after the trial has ended provide strong support for Congress' judgment that a prisoner must either pay for what he seeks or demonstrate some need for it.

ARGUMENT

AN INDIGENT PRISONER WHO DID NOT APPEAL HIS CONVICTION IS ENTITLED TO A VERBATIM TRANSCRIPT OF HIS TRIAL ONLY IF HE CAN DEMONSTRATE THAT A TRANSCRIPT IS NECESSARY TO SUPPORT A NONFRIVOLOUS ATTACK ON HIS CONVICTION OR SENTENCE

This case presents a question pretermitted by this Court in *Wade* v. *Wilson*, 396 U.S. 282, 286—whether "the Constitution requires that [the federal government] furnish an indigent * * * prisoner free of cost a trial transcript to aid him to prepare a petition for collateral relief." Seven courts of appeals, and district courts in two other circuits, have addressed this question; the instant decision stands alone in holding that a prisoner has an unconditional constitutional [5]

[5] The court of appeals relied solely upon constitutional grounds for its holding; it did not find that respondent's allegations established either a need for a transcript or a probability that the transcript would be relevant to a nonfrivolous claim.

right to a transcript for the purpose of searching it in the hope of discovering errors.[6] We demonstrate that it is not unfair to require a prisoner to pay for a transcript in the absence of any showing of a colorable need for one to support an arguably meritorious claim, when the prisoner had, but did not use, an opportunity to appeal his conviction.

A. THE CONSTITUTION IS SATISFIED WHEN AN INDIGENT DEFENDANT IS AFFORDED A FAIR OPPORTUNITY TO HAVE HIS CLAIMS ADJUDICATED

28 U.S.C. 1915(a) provides that a district court may allow an indigent to seek collateral relief without prepayment of fees or costs. 28 U.S.C. 753(f) provides that once the court has done so a transcript of the trial will be provided "if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented * * *." The court of appeals in effect held Section 753(f) unconstitutional by holding that an indigent is constitutionally entitled to a transcript to peruse for error, whether or not there has been a dem-

[6] See *Benthiem* v. *United States*, 403 F. 2d 1009 (C.A. 1); *United States* v. *Shoaf*, 341 F. 2d 832 (C.A. 4); *United States* v. *Herrera*, 474 F. 2d 1049 (C.A. 5), certiorari denied, 414 U.S. 861; *Bentley* v. *United States*, 431 F. 2d 250 (C.A. 6), certiorari denied, 401 U.S. 920; *Culbert* v. *United States*, 325 F. 2d 920 (C.A. 8); *Martinez* v. *United States*, 344 F. 2d 325 (C.A. 10); *Gibbs* v. *United States*, 346 F. Supp. 1237 (E.D. Pa.); *Poe* v. *United States*, 229 F. Supp. 6 (D.D.C.).

Five of these courts have reached the same conclusion in state *habeas corpus* cases. See *Ellis* v. *Maine*, 448 F. 2d 1325 (C.A. 1); *Jones* v. *Superintendent*, 460 F. 2d 150 (C.A. 4), certiorari denied, 410 U.S. 944; *Bonner* v. *Henderson*, 517 F. 2d 135 (C.A. 5); *Chavez* v. *Sigler*, 438 F. 2d 890 (C.A. 8); *Hines* v. *Baker*, 422 F. 2d 1002 (C.A. 10).

597-434—75——3

onstration of need and lack of frivolity.[7] This result, it stated, was required by cases holding that States cannot deny to indigent defendants whatever hearings and appeals it has made available to the wealthy. We submit, however, that this Court's decisions do not establish for indigents a right equal to that of the "wealthy," as the court of appeals supposed, to procure transcripts without a showing of need. Nor do this Court's cases create for indigents a right, not shared even by the "wealthy," to receive a trial transcript without any cost or effort on their own part. They hold only that an indigent defendant is entitled to a *fair* opportunity to have his claims adjudicated.

In a series of cases involving indigents who asserted that they were unable to pay filing fees or the cost of transcripts, this Court has made it clear that once a government creates a right to judicial review, it cannot erect barriers that preclude its effective exercise by indigents. See, *e.g.*, *Griffin* v. *Illinois*, 351 U.S. 12; *Draper* v. *Washington*, 372 U.S. 487; *Lane* v. *Brown*, 372 U.S. 477; *Coppedge* v. *United States*, 369 U.S. 438, 446. The central theme running through the cases is that the government must afford indigents the same "practical opportunity for review" of their criminal convictions (*Griffin, supra*, 351 U.S. at 23; Frankfurter, J., concurring) that is available to other defendants. A government "with an appellate system which [makes] available trial transcripts to those who [can] afford them [is] constitutionally required

[7] The court wrote that it was "fill[ing] a constitutional deficit not addressed by the statute" (Pet. App. 9a).

to provide 'means of affording adequate and effective appellate review to indigent defendants' " (*Lane* v. *Brown, supra*, 372 U.S. at 483, quoting from *Griffin, supra*, 351 U.S. at 20).[8] The same principle applies to appellate review of collateral attacks.[9]

The critical question here, as in the other cases, is the definition of "adequate and effective" review. The Court has held that "adequate and effective" review is available even when the government does not provide the indigent with every legal tool available to a defendant who can afford it. "Adequate and effective" review is a "practical" standard, for "[t]he question is not one of absolutes, but one of degrees" (*Ross* v. *Moffitt*, 417 U.S. 600, 612).

[8] In direct appeal cases after *Griffin*, the Court invalidated state practices conditioning the availability of a transcript on the trial judge's finding that an indigent's appeal was not frivolous (*Draper* v. *Washington*, 372 U.S. 487) or automatically denying transcripts to indigents appealing from convictions for "quasi-criminal" violations (*Williams* v. *Oklahoma City*, 395 U.S. 458) or misdemeanors (*Mayer* v. *City of Chicago*, 404 U.S. 189).

[9] In *Burns* v. *Ohio*, 360 U.S. 252, the Court held invalid a rule requiring payment of a filing fee to obtain discretionary review in the State's highest court. In *Smith* v. *Bennett*, 365 U.S. 708, it found defective an identical barrier to the right to petition for *habeas corpus*. In *Lane* v. *Brown*, 372 U.S. 477, the Court struck down a law leaving to the discretion of the Public Defender the decision to order a transcript of a preliminary hearing, when the transcript was necessary to confer jurisdiction on the State's supreme court to hear an appeal from a dismissal of *coram nobis* proceedings. And in *Long* v. *District Court of Iowa*, 385 U.S. 192, the Court declared unconstitutional a state rule that denied an indigent a transcript of his *habeas corpus* hearing, when a transcript was "available and could easily have been furnished" (*id.* at 195).

> [T]he fact that a particular service might be of of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly * * *. [*Id.* at 616.]

Ross is the most recent clarification of the Court's approach, summarizing principles that had long predominated. For example, in *Griffin* the Court invalidated a state rule that effectively "decreed that only defendants who can afford to pay for the stenographic minutes of a trial may have trial errors reviewed on appeal" (351 U.S. at 22, Frankfurter, J., concurring); but at the same time it was recognized that the State need not provide a transcript on demand if "other means" afford adequate opportunity for review (*id.* at 20).[10] In *Eskridge* v. *Washington,* 357 U.S. 214, 216, the Court observed: "We do not hold that a State must furnish a transcript in every case involving an indigent defendant." In *Draper* v. *Washington, supra* 372 U.S. at 495, the Court wrote that "part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily

[10] In *Burns* v. *Ohio*, 360 U.S. 252, n. 11, after quoting *Griffin's* conclusion that "[w]e are confident that the State will provide corrective rules to meet the problem which this case lays bare," the Court noted that Illinois had subsequently changed its rules to make a transcript available to an indigent when "necessary to present fully the errors recited in the petition * * *."

in such circumstances." And in *Britt* v. *North Carolina,* 404 U.S. 226, 230, the Court indicated that a transcript is unnecessary if the defendant has available an "informal alternative" that is substantially equivalent to a transcript.

We do not suggest that the Court should take a restrictive view of the need for transcripts in the modern system of criminal justice. Nor has the Court done so. Its cases have decreed a "flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way." *Mayer* v. *City of Chicago,* 404 U.S., 189, 196–197. We argue only that fair access to judicial review for indigents can be achieved in many ways, and the Court has followed no unyielding practice, but has instead adopted an elastic approach keyed to the avenue of review and the demonstrated needs of particular litigants.

This pragmatic approach has led the Court to isolate a few situations in which indigent defendants must be afforded transcripts without a particularized showing of need. The transcript of a preliminary hearing (*Roberts* v. *LaVallee,* 389 U.S. 40) or of a previous mistrial (*Britt* v. *North Carolina, supra*) can be obtained without such a showing, so long as no functional alternative is available.[11] Similarly, a federal

[11] In *Roberts* the Court "found it unnecessary to discuss the question" (see *Britt* v. *North Carolina, supra,* 404 U.S. at 228, n. 3) whether a particular need must be shown. The Court stated, however, that "[o]ur decisions for more than a decade now have made clear that differences in access to the instruments *needed* to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution" (389 U.S. at 42; emphasis added).

defendant seeking to take a direct appeal *in forma pauperis* is entitled to "a record of sufficient completeness" to enable him to attempt to show that his appeal would not be frivolous (*Coppedge* v. *United States, supra,* 369 U.S. at 446). And "where counsel on appeal was not counsel at the trial," the defendant is entitled to a verbatim transcript without any further showing of need (*Hardy* v. *United States,* 375 U.S. 277, 282).

In other situations the Court has declined to establish an inflexible constitutional rule that would provide an indigent with a full transcript of his trial without a colorable showing that it is necessary for an effective appeal. For example, in *Mayer, supra,* the Court observed that the government "must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way" (*id.* at 195). But it also observed that "[a] 'record of sufficient completeness' does not translate automatically into a complete verbatim transcript" (*id.* at 194). "[W]here the grounds of appeal * * * make out *a colorable need* for a complete transcript, the burden is on the State to show that only a portion of the transcript or an 'alternative' will suffice for an effective appeal on those grounds" (*id.* at 195; emphasis added).

Ross v. *Moffitt, supra,* held that an indigent defendant, who is constitutionally entitled to appointed counsel on direct appeal (*Douglas* v. *California,* 372

U.S. 353), does not possess the same entitlement when relief is discretionary. *Ross* demonstrates that the test of an indigent's right to a particular legal service is whether that service is necessary to an "adequate opportunity to present his claims fairly" (417 U.S. at 616), and that the inquiry into whether he has received such an opportunity must take account of the nature of his claim. (See Part C, *infra.*) The fact that a particular service might conceivably "be of benefit to an indigent defendant does not mean that the service is constitutionally required" (*ibid.*). Thus, in *Ross,* what was necessary on direct appeal was held to be not constitutionally required in subsequent proceedings."[12]

B. AN INDIGENT DEFENDANT HAS A FAIR OPPORTUNITY TO HAVE HIS CLAIMS RESOLVED BY TAKING AN APPEAL

Respondent has had the "adequate opportunity to present his claims fairly" (*Ross, supra,* 417 U.S. at 616) that the Due Process Clause of the Fifth Amendment demands. He could have appealed his conviction, for he "no doubt was advised by the trial court of his right to [appeal] and knew he could exercise such right" (Pet. App. 22a; Taylor, J., dissenting). But respondent and his trial counsel chose not to appeal.

---

[12] *Ross* relied in part upon the fact that the indigent had received the services of an attorney on direct appeal. Although respondent did not receive similar services, he was entitled to them. He has not been deprived of such assistance on account of his indigence, but on account of his decision not to appeal. And, of course, respondent has been represented by counsel in his attempt to obtain a trial transcript.

Respondent has not alleged that he desired to appeal but was frustrated by his attorney or that his attorney failed properly to counsel him concerning his right to appeal—matters on which the transcript respondent seeks would shed no light. If respondent had appealed, he could have obtained a full transcript of his trial.[13] And if he had been unsuccessful on his appeal and had sought collateral relief, his attorney or the government would have provided him with a copy of the transcript that already had been prepared. See 28 U.S.C. 2250. In short, respondent's current difficulties stem from his own decision not to appeal his conviction. He has not been denied effective judicial review—either on appeal or on collateral review—on account of his indigence.

[13] As an indigent, respondent was represented at trial, and was entitled to representation on appeal, by an attorney appointed under the Criminal Justice Act (18 U.S.C. 3006A). 28 U.S.C. 753 (f) provides that fees for transcripts for individuals represented on appeal under the Criminal Justice Act "shall be paid by the United States."

Under the standards of *Coppedge*, *supra*, respondent automatically would have received "a record of sufficient completeness" to enable him to demonstrate that his appeal was not frivolous. If either the district court or the court of appeals agreed with respondent that his appeal was not frivolous, the court of appeals would have considered his appeal "in the same manner" as a paid appeal, and his counsel could have obtained, at government expense, whatever portions of the transcript may have been relevant to his claims on appeal. In most cases a full transcript is prepared. Had respondent been represented by new counsel on appeal he would have been entitled to a full transcript even to make the threshold demonstration of nonfrivolous grounds for appeal. *Hardy* v. *United States*, *supra*.

Respondent's entitlement to a transcript on appeal provided him a fair opportunity to present his claims as fully as he desired. It seems likely that, if respondent or his counsel had believed that meritorious grounds for reversal were present, respondent would have appealed. While the readier availability of a transcript on a direct appeal may encourage indigents to take such appeals, this effect is consistent with sound judicial administration. If an appeal were taken immediately, a defendant and his counsel would be more likely to remember the trial and the incidents during the trial that might be grounds for reversal; consequently, they would be able to cooperate with the prosecutor in designating portions of the record that would avoid the necessity of full reproduction and consequent waste of court reporters' time.[14] Moreover, if there are errors in a trial, reversal and immediate retrial is vastly preferable to successful collateral attack and a retrial years later when memories have dimmed and the evidence on both sides has dissipated.

What is more, if a defendant who elected not to appeal later petitions for collateral relief, it seems most likely that the change of heart would have been caused by some intervening event—perhaps a change in the law, perhaps the sudden remembrance of an event at trial that had been overlooked when the initial decision not to appeal had been made. It is

[14] Cf. *United States* v. *Schmitz*, C.A. 9, No. 75-2056, decided August 5, 1975 (Chambers, C. J., in chambers).

not unfair for Congress to require a defendant who changes his mind in this fashion to state the reasons for the change. That statement of reasons would enable the district court to ascertain whether the indigent prisoner needs a transcript in order to make a nonfrivolous claim for collateral relief.

We think this argument addresses and satisfactorily answers a recurring theme in this Court's transcript cases—that it is unfair to require an indigent defendant to rely upon memory alone when the more affluent can supplement their memories with transcripts. For example, in *Gardner* v. *California,* 393 U.S. 367, 369, the Court held that it would be unfair to require an indigent defendant to "draw on his memory [of a prior hearing] in preparing his application" for collateral relief, where the State court required him to show that the prior hearing was inadequate. And in *Britt, supra,* 404 U.S. at 229, the Court wrote: "We have repeatedly rejected the suggestion that in order to render effective assistance, counsel must have a perfect memory or keep exhaustive notes of the testimony given at trial." The court of appeals reiterated this theme, arguing that Section 753(f) "requires an imprisoned indigent to remember constitutional deficiencies and to relate them to an attorney or directly to the court, neither of whom may have had any previous contact with the prisoner or his trial * * * [W]e do not read the Supreme Court's opinions nor the Constitution itself

to require paupers to have better memories than the affluent" (Pet. App. 14a–15a). It would, indeed, be unfair if an indigent defendant were required to rely soley upon his memory or that of his counsel in order to support his claim. But under Section 753(f) the defendant's memory need only provide him with some reason why a transcript would be helpful; he need not rely on his memory to establish the claim on its merits. And the very fact that a defendant has applied for collateral relief after he decided not to appeal suggests that the defendant *has* remembered something from the original trial. An applicant for collateral relief under these circumstances should have no difficulty articulating what he has remembered that now has convinced him that good grounds for relief exist.

Even if this line of argument is discounted, respondent was not treated unfairly by being required to articulate his reasons for believing that the transcript would reveal grounds to set aside his conviction. As *Ross* emphasized, the inquiry into whether an indigent has need of a particular legal service turns in large measure upon the nature of the proceeding in which he presents his claims. We explain in the following discussion that there are sound constitutional grounds for distinguishing between direct appeal and collateral attack, and that these differences justify the requirements of Section 753(f)—that an indigent demonstrate a colorable need for a transcript to support an arguably meritorious claim.

C. THE FUNDAMENTAL DIFFERENCES BETWEEN APPEAL AND COLLATERAL ATTACK SUPPORT THE REQUIREMENTS OF SECTION 753(f)

Prior to the instant case, the courts of appeals uniformly had held that furnishing a transcript to a prisoner "ought to be responsive to the appearance of need for it" (*United States* v. *Shoaf,* 341 F. 2d 832, 836 (C.A. 4)), and that a prisoner has no right to a transcript for "exploratory use" in a belated search for error. The underlying rationale of these cases, in six circuits, is that requiring an indigent prisoner to show a colorable need for a verbatim transcript is consistent with the fact that collateral attack is an extraordinary mode of relief. We believe that that reasoning is correct.

We begin with the observation that this Court never has required a State to provide indigents seeking collateral review with transcripts of their *trials.* In each of the three cases dealing with transcripts for use on collateral attack, the indigent sought a transcript of the hearing in the collateral attack proceeding itself, where such a transcript was necessary to preserve an effective right to further review within the state system. *Lane* v. *Brown, supra,* involved a transcript of a *coram nobis* hearing that had to be filed with an appellate court as a prerequisite to review; *Long* v. *District Court of Iowa,* 385 U.S. 192, involved a transcript of a *habeas corpus* hearing, as did *Gardner* v. *California, supra.* After discussing *Lane, Smith* v.

Bennett, 356 U.S. 708, and related cases, the Court observed in *Ross* v. *Moffitt, supra* (417 U.S. at 607; emphasis added): "The decisions discussed above stand for the proposition that a State cannot arbitrarily cut off *appeal* rights for indigents while leaving open avenues of appeal for more affluent persons." As we now show, there are fundamental reasons, rooted in the nature of collateral attack, that explain the courts' reluctance to hold that the Due Process Clause confers upon indigents an unqualified right to a free verbatim transcript of their trials in that context.

It is an established rule that the writ of *habeas corpus* and its federal counterpart, 28 U.S.C. 2255, "will not be allowed to do service for an appeal" (*Sunal* v. *Large,* 332 U.S. 174, 178). For this reason, nonconstitutional claims that could have been but were not raised on appeal may not be asserted in collateral proceedings (*id.,* at 178–179; *Davis* v. *United States,* 417 U.S. 333, 345–346).[15] Even claims that could not have been asserted on direct appeal can be raised collaterally only if the alleged error constituted "a fundamental defect which inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances where the need for the remedy afforded

[15] "Every error is potentially reversible error; and many rulings of the trial court spell the difference between conviction and acquittal. If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by *habeas corpus,* litigation in these criminal cases will be interminable" (*Sunal* v. *Large, supra,* 332 U.S. at 182).

by the writ of *habeas corpus* is apparent" (*Davis, supra,* 417 U.S. at 346; *Hill* v. *United States,* 368 U.S. 424, 428). In short, collateral attack is designed to test only "the very gravest allegations" of error (*Townsend* v. *Sain,* 372 U.S. 293, 312; *Kaufman* v. *United States,* 394 U.S. 217, 223–224).

In light of the very limited role of collateral review in our system of criminal justice—and the fact that the prisoner bears the heavy burden of assailing a facially valid judgment—it was reasonable for Congress to require an indigent prisoner to demonstrate a need for the trial transcript he seeks. Indeed, logic and practical experience suggest that a prisoner ordinarily has no such need; he therefore should be required to demonstrate that his case falls within the exception rather than the rule.

Few of the grounds that might arguably support collateral relief are likely to be established by review of the transcript of the trial. A trial transcript is most useful to establish errors in trial procedure (such as decisions to admit or exclude particular evidence, erroneous jury instructions, or claims of evidentiary insufficiency) that ordinarily must be raised on direct appeal or not at all. See generally Wright, *Federal Practice and Procedure: Criminal* § 595 (1969). Even a collateral attack upon the effectiveness of assistance of counsel cannot be founded simply upon disagreement with counsel's trial tactics: for example, disagreements with counsel's failure to object to questions or his cross-examination of

witnesses, the matters on which a transcript could be expected to shed light, do not demonstrate ineffective assistance.[16] Nor will a claim of insufficiency of the evidence, such as respondent raised (see App. 12), support collateral relief; respondent would have to allege that there was *no* evidence to support his conviction (*Garner* v. *Louisiana,* 368 U.S. 157; *United*

[16] "Questions of trial technique and strategy, being peculiarly individual in nature, are subject to appellate court scrutiny only where the representation is shown to have been so inadequate as to have virtually deprived the defendant of a trial." *United States* v. *Radford,* 452 F.2d 332, 335 (C.A. 7); see also *United States* v. *Hammonds,* 425 F.2d 597, 601 (C.A.D.C.).

Some courts have replaced the traditional standard for evaluating the assistance of counsel with a more rigorous standard. See, *e.g., United States* v. *DeCoster,* 487 F.2d 1197 (C.A.D.C.); *Beasley* v. *United States,* 491 F.2d 687 (C.A. 6). These courts of appeals would hold that, under some circumstances, counsel's inadequate overall performance at trial can deny a defendant his Sixth Amendment right to counsel. However, these latter courts apply different standards on collateral attack. Tactical "[e]rrors, even egregious ones [that might call for reversal on appeal], do not provide a basis for postconviction relief" (*United States* v. *Rubin,* 433 F.2d 442, 445 (C.A. 5)). And *DeCoster* itself expressly acknowledged the continuing authority of *Bruce* v. *United States,* 379 F.2d 113, 117 (C.A.D.C.), which held that "a more powerful showing of inadequacy is necessary to sustain a collateral attack than to warrant an order for a new trial * * * on direct appeal." Cf. *DeCoster, supra,* 487 F.2d at 1202 (Bazelon, C. J.).

We do not imply by this that one in respondent's position is foreclosed from contending that he has received inadequate assistance of counsel. Collateral review of such claims is particularly appropriate where the grounds of the contention do not appear in the record on direct appeal. We do submit, however, that decisions of trial tactics—which would have appeared in the record on direct review—cannot appropriately be assailed collaterally in the absence of a demonstration that appellate counsel was inadequate.

States ex rel. Vajtauer v. *Commissioner of Immigration,* 273 U.S. 103).[17] At all events, claims of total lack of evidence could be refuted by a production of exhibits or portions of a trial transcript; a full transcript would be superfluous once *some* evidence of guilt was discovered.

By the same token, many of the grounds that might arguably support collateral relief either are evident from documents other than the trial transcript or are not reflected in the records at all.[18] Judge (now Chief Judge) Haynsworth of the Fourth Circuit spoke soundly and from experience in observing (*United States* v. *Shoaf,* 341 F. 2d 832, 835):

[17] Moreover, the failure to assert on direct appeal a claim of total absence of evidence to support a conviction almost certainly would constitute a "deliberate bypass" (*Kaufman* v. *United States*, *supra*, 394 U.S. at 227, n. 8). Respondent has not alleged either that there was no evidence to support his conviction or that his counsel's assistance was ineffective because counsel did not pursue an appeal.

[18] A form proposed by the Judicial Conference of the United States for use by prisoners in filing Section 2255 motions lists, as an aid to the prisoner, the following "most frequently raised grounds for [Section 2255] relief":

(a) Denial of effective assistance of counsel.

(b) Denial of right of appeal.

(c) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(d) Conviction obtained by use of coerced confession.

(e) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(f) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(g) Conviction obtained by a violation of the privilege against self-incrimination.

(h) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(i) Conviction obtained by a violation of the protection against double jeopardy.

(j) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

See *Proposed Rules Governing § 2255 Proceedings for the United States District Courts*, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Preliminary Draft, 1973).

> The usual grounds for successful collateral attacks upon convictions arise out of occurrences outside of the courtroom or of events in the courtroom of which the defendant was aware and can recall without the need of having his memory refreshed by reading a transcript. * * * [R]arely, if ever, would the defendant, himself, need a transcript of the trial to become aware of the events or occurrences which constitute a ground for collateral attack.

Because a transcript of the trial is so rarely needed to support even a meritorious collateral attack, and because the prisoner must bear the initial burden of impeaching the validity of his conviction, it is not fundamentally unfair for Congress to provide free trial transcripts only to those prisoners who make a showing of colorable need for a transcript to support a nonfrivolous claim. We submit that the inquiry into possible need and conceivable merit is no more demanding an inquiry than a prisoner who could afford a transcript would address to himself and his counsel. With the exception of the exceedingly wealthy for

whom money is no object, an individual able to pay for a transcript, but aware of the limited scope of review on collateral attack, would ask himself whether a transcript was likely to be of use. He might remember incidents at trial that he thought unfair to him; if he did, he might order a transcript to refresh his memory and create documentation in anticipation of applying for collateral relief. He would not, however, expend his funds without some prospect of return.[19] Section 753(f) establishes the same sort of process: respondent need only state *why* he believes that he was denied the effective assistance of counsel. Once he has told the court the basis for his contention, the court could order a full transcript of the trial to be prepared, direct the preparation of the relevant part of the transcript, or rule that the allegations, even if true, would not create an entitlement to relief.

The rule that an indigent must show a need for a transcript to support a colorable claim does not leave respondent and others in his position without significant legal aid. Federal courts are not closed to those who cannot afford transcripts. On the contrary, a trial transcript is available if the prisoner can make

[19] Cf. Oaks and Lehman, *A Criminal Justice System and the Indigent* 150 (1968): "The more advantages society extends to the indigent, the more apparent is the comparative disadvantage of being of modest means. Indigents * * * are already receiving more than many 'non-indigents' can afford. * * * Even those with sufficient resources * * * will probably be unwilling to beggar themselves to enjoy the same opportunity as an indigent appellant, who is furnished with appellate counsel, a free transcript and an allowance for out-of-pocket expenses no matter how frivolous his appeal."

even a minimal showing—and counsel often is provided to help him make that showing. In *Coppedge* v. *United States, supra,* this Court established the procedure to be followed by the federal courts in passing upon applications to appeal *in forma pauperis* under 28 U.S.C. 1915(a). The district court here applied the *Coppedge* procedure to respondent's application for collateral relief. After receiving respondent's complaint, the court permitted him to proceed *in forma pauperis.* Because it was not possible to ascertain from the complaint whether, under the "objective" standard of *Coppedge,* a nonfrivolous issue was presented, the Court appointed counsel to aid in attempting to discover the nature of respondent's complaint and to present to the court any facts establishing that respondent was in need of a transcript to support a nonfrivolous claim for release. As counsel later represented to the court of appeals, however, his investigations did not yield any reason to believe that the transcript would support respondent's bare assertions, or that it would be needed for any reason other than to search it in the hope that it would yield support for an assertion whose nature could not yet be discovered (Pet. App. 2a). Only when the investigation with the aid of counsel was unsuccessful did the district court decline to require the government to prepare and provide respondent with a verbatim transcript.[20]

[20] The court of appeals apparently believed that, because the district court had permitted respondent to proceed *in forma pauperis* and had appointed counsel for him, it effectively had concluded that respondent had presented a nonfrivolous claim for collateral relief. See Pet. App. 10a, 19a. In the court of appeals'

Respondent has had a fair opportunity to receive a transcript, either by taking a direct appeal or by showing, as Section 753(f) requires, a particularized need for a transcript to support a colorable claim for collateral relief. The requirements of Section 753(f) are justified by the limited scope of review on collateral attack.[21] Section 753(f) acts as a reasonable check against attempts to make collateral attack do service for appeal; it reinforces the fact that collateral review "is a special proceeding to right wrongs, not a routine procedure to search for them * * *" (*Bernier* v. *Moore,* 441 F. 2d 395, 396 (C.A. 1)). As the same court has elsewhere put the matter, collateral attack is not "a general form of relief for those who seek to explore their case in search of its existence" (*Aubut* v. *Maine,* 431 F. 2d 688, 689).

---

view, this meant that the only constitutional question remaining was whether a prisoner must demonstrate a particularized need for a transcript to support a claim for collateral relief that the court already had concluded was not frivolous.

We submit that this seriously misconceives the import of the district court's action. The court of appeals failed to distinguish a nonfrivolous *claim for a transcript* from a nonfrivolous *claim for collateral relief*. The district court concluded that respondent had demonstrated the former, and therefore appointed counsel to assist respondent and the court in ascertaining whether respondent should receive the transcript for which he had made a nonfrivolous claim. The district court had not then passed upon whether the requirements of Section 753(f) were met; indeed, the court appointed counsel for respondent so that such an inquiry could be undertaken. When the district court thereafter concluded that respondent was not entitled to a transcript, it implicitly resolved against respondent both the question of need and the question of nonfrivolous grounds for collateral relief.

[21] The court of appeals observed (Pet. App. 9a) that the "need" requirement of Section 753(f) does not extend in terms to transcripts ordered in connection with *habeas corpus* petitions by federal prisoners. That fact, the court apparently believed, contradicted the congressional design "to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by *habeas corpus* * * *" (*Hill* v. *United States,* 368 U.S. 424, 427). However, we do not believe there is any contradiction. While Section 753(f) does not expressly authorize a judge to condition the provision of a trial transcript in *habeas corpus* proceedings on a showing of colorable need, the section must be read in light of its legislative history. Prior to 1965, Section 753(f) contained no reference to Section 2255. A conflict therefore had developed in the courts of appeals whether the federal courts had power to order transcripts for use in Section 2255 proceedings. (See Pet. App. 9a; Sokol, *The Availability of Transcripts for Federal Prisoners,* 2 Am. Crim. L. Q. 63 (1964)). The amendment to Section 753(f) was intended to make it clear that indigents petitioning under Section 2255 had as great a right to a transcript as did those petitioning for *habeas corpus.* The inclusion of language requiring a showing of colorable need for a transcript merely reflected the judicial practice under Section 2255, as under *habeas corpus,* of providing transcripts only in response to a showing of a colorable need. See *Benthiem* v. *United States,* 403 F. 2d 1009, 1011 (C.A. 1); *Ketcherside* v. *United States,* 317 F. 2d 807, 808 (C.A. 6).

D. THE ROUTINE PROVISION OF TRIAL TRANSCRIPTS WITHOUT A SHOWING OF NEED WOULD SIGNIFICANTLY INCREASE THE WORKLOAD OF COURT REPORTERS AND CONTRIBUTE TO THE ALREADY SERIOUS PROBLEM OF DELAY IN THE FEDERAL APPELLATE COURTS

The limited scope of collateral review of convictions is attributable in major part to the need to accord finality to judgments entered after fair trials. Another practical consideration supports the limited scope of review under Section 2255—the burden imposed by such proceedings on the legal system, from judges to clerical personnel.

> Those resources are limited but demand on them constantly increases. There is an insistent call on federal courts both in civil actions, many novel and complex, which affect intimately the lives of great numbers of people and in original criminal trials and appeals which deserve our most careful attention. To the extent the federal courts are required to re-examine claims on collateral attack, they deprive primary litigants of their prompt availability and mature reflection. After all, the resources of our system are finite: their over-extension jeopardizes the care and quality essential to fair adjudication. [*Schneckloth* v. *Bustamonte*, 412 U.S. 218, 260–261 (Powell, J., concurring; footnotes omitted).]

The same considerations that call for limits upon the issues cognizable on collateral review also call for limitations upon the assistance courts will furnish to those who would seek collateral relief.[22] The indigent prisoner who has waived appeal but subsequently requests a verbatim trial transcript creates a drain on judicial resources perhaps even more severe than does the defendant with a transcript who frivolously seeks to relitigate ordinary trial errors. Section 753(f) creates a practical and fair limitation, allowing the district court to sift frivolous cases from those deserving of a greater call upon our limited resources.

[22] Mr. Justice Powell's concern with the burgeoning resort to relief in the federal courts by federal and state prisoners is supported by statistics indicating that between 1966 and 1975 petitions by federal prisoners rose from 2,292 to 5,047, an increase of 120.2%; and petitions by state prisoners rose from 6,248 to 14,260, an increase of 128.2%. *1975 Annual Report of the Director of the Administrative Office of the United States Courts*, p. XI–49.

Delays in transcription are a major contributor to the serious problem of delay in the federal appellate courts.[23] If prisoners can receive a transcript of their trial without any showing of need, it is not unreasonable to assume that a substantial number of those who did not appeal their convictions [24] will request a transcript to explore for error, thereby further increasing the workload of the limited pool of federal court reporters. And a constitutional requirement that verbatim transcripts must be furnished to prisoners on demand would apply equally to state prisoners who did not appeal but who request a transcript to

[23] "The problem goes beyond fairness and monetary considerations and seriously involves the efficient functioning of the courts. It has been noted time and again that the delay in deciding appeals is often attributable to delay in getting a transcript." *Jones* v. *Superintendent*, 460 F. 2d 150, 153, n. 4 (C.A. 4), certiorari denied, 410 U.S. 944. See also Ebersole, *improving Court Reporting Services*, Federal Judicial Center, pp. 3, 29–31 (February 1972). The Administrative Office of the United States Courts has informed us that it believes requests for transcripts to be used only for perusal in the hope of finding an error would require many hours of court reporters' time—time that is urgently needed for transcribing materials necessary for appeals and arguably meritorious collateral attacks.

[24] Approximately one of every three persons convicted after a trial in the federal courts currently does not appeal his conviction.

Year	Convictions after trial	Criminal appeals filed
1972	5,506	3,980
1973	5,974	4,453
1974	5,539	4,067
1975	5,617	4,187

Source: *Annual Report of the Director of the Administrative Office of the United States Courts (1972, 1973, 1974, and 1975), Tables B1 and D1.*

pursue state or federal post-conviction remedies. Such a rule, therefore, would both increase the burden upon state court reporters and create additional inducement to state prisoners to have recourse to federal collateral attack.

The court of appeals discounted these practical considerations by suggesting that "[i]f a free transcript were prepared on demand, the transcript may well reveal no colorable grounds for collateral attack, and the court will be spared the time consumed in a transcript hearing and a frivolous 2255 motion" (Pet. App. 18a). Experience indicates, however, that there is no reason to suppose that the availability of transcripts diminishes the incidence of "frivolous 2255 motion[s]." Nor are we aware of any significant problem of lengthy "transcript hearing[s]" that would justify the solution the court of appeals suggested; certainly the other courts of appeals have perceived none.[25]

We do not argue that the drain upon judicial and reportorial resources is a good reason for denying trial transcripts to all indigent prisoners. That would be too high a price to pay for administrative convenience. The practical considerations we have discussed are, however, strong support for Congress' judgment, expressed in Section 753(f), that a prisoner must demonstrate a need for the transcript he seeks. Congress has not attempted to block the poor from

[25] Moreover, such considerations, even if valid, are properly addressed to the legislative decision and afford no grounds for the judiciary to reject as unconstitutional the decision of Congress that a showing of need should be required.

vindicating just claims. Section 753(f) simply adopts a procedure this Court already has approved for use in determining whether an indigent is entitled to publicly appointed counsel on appeal. *Coppedge, supra,* instructed the lower federal courts to grant motions to appeal *in forma pauperis* whenever the movant is able to make "a rational argument on the law or facts" (*id.* at 448) or present "arguable claims" for relief on the merits (*id.* at 454). Section 753(f) creates an identical procedure for the indigent who has waived appeal and seeks a transcript to pursue collateral attack: he need show only a colorable claim for relief arguably necessitating the preparation of a full transcript. The requirements of Section 753(f), no less than this Court's decision in *Coppedge*, are sensible, practical, and equitable. They do not deny respondent due process of law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
RICHARD L. THORNBURGH,
Assistant Attorney General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.
JEROME M. FEIT,
MICHAEL W. FARRELL,
Attorneys.

NOVEMBER 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1976